

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose amendments to §§11.403-11.406, and §11.411 relating to Transportation Alternatives Set-Aside Program to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the general counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the commission that the amendments to §§11.403-11.406, and §11.411 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

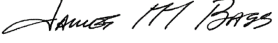
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:

Recommended by:

DocuSigned by:

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Director, Public Transportation Division

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Executive Director

115852 Sept. 24, 2020

Minute	Date
Number	Passed

Proposed Preamble

The Texas Department of Transportation (department) proposes amendments to §§11.403-11.406, and §11.411, concerning Transportation Alternatives Set-Aside Program.

EXPLANATION OF PROPOSED AMENDMENTS

The department is amending its current Transportation Alternative Set-Aside Program (TASA) rules to encourage and improve project proposals from communities with a population of 50,000 or less, reduce the department's risk of federal funds lapsing in the nonurban funding category, streamline project delivery, and improve the likelihood of successful completion of awarded projects. Changes to the rules regarding eligible activities, allowable costs, local fund matching requirements, and project selection by metropolitan planning organizations (MPO) and the department are proposed.

Under federal guidelines, the department is responsible for project oversight for preliminary engineering and construction whether TASA funds are administered by the department or an MPO. These direct state costs are federally reimbursable and are included as a part of the overall project award for the department's program and some MPO programs. However, some MPOs require the project sponsor to cover direct state costs at 100 percent.

1 Amendments to §11.403, Project Selection by MPOs, add a new
2 subsection (e) to require an MPO to include the department's
3 direct state costs for oversight of preliminary engineering and
4 construction in TA Set-Aside project awards. This change reduces
5 the financial exposure for communities applying for TASA funds
6 administered by MPOs and establishes consistency among the MPOs
7 across state. This change also provides consistency among
8 projects administered by an MPO and projects administered by the
9 department. Existing subsections (e)-(j) are re-designated
10 accordingly.

11
12 The amendment to re-designated subsection (j) restricts project
13 sponsors from submitting a project to both a department TASA
14 program call and an MPO program call concurrently.

15
16 The department's Public Transportation Division's (PTN) Bicycle
17 and Pedestrian Section administers TASA funds for projects
18 located outside Census Urbanized Areas of 200,000 or greater,
19 which are identified as Transportation Management Areas (TMAs).
20 MPOs administer TASA funds within their entire planning area.
21 This results in areas of overlap, where communities that fall
22 inside an MPO but outside the TMA boundary are eligible to apply
23 for TASA funds from both the department and the relevant MPO.
24 Currently, a project sponsor in an overlapping area that submits
25 a project to an MPO's call for projects and is not awarded funds,
26 is prohibited from submitting that same project to any department
27 TASA program call. This prohibition reduces the pool of

1 potential applications to the department's TASA call for
2 projects, especially applications from smaller communities within
3 MPO boundaries that may have a hard time competing with larger
4 communities within their MPO. Additionally, smaller MPOs receive
5 limited TASA funding, which may result in their funding only a
6 few projects in each program call.

7
8 The amendment to re-designated subsection (j) also removes the
9 restriction that prohibits a project sponsor from submitting a
10 project to a future department TASA program call or future MPO
11 program call.

12
13 Under federal guidelines, TASA funds are available for
14 obligation for a period ending three years after the last day of
15 the federal fiscal year for which the funds are authorized. TASA
16 funds are allocated based on population, with approximately half
17 of the department's TASA funds being eligible to communities
18 with a population of 5,000 or less (nonurban) and the other half
19 being eligible to communities with a population of 5,001 -
20 200,000 (small urban). In large urbanized areas with
21 populations over 200,000, FHWA requires that the state
22 suballocate TASA funding directly to MPOs, based on their
23 relative share of population, to administer according to the
24 MPO's needs. The department is responsible for preliminary
25 engineering and construction oversight on both state-selected
26 and MPO-selected projects. Communities with populations of
27 50,000 or less are ideal candidates for the program because they

1 have a significant need to construct basic infrastructure for
2 safer walking and bicycling but have limited financial
3 resources. However, these communities face challenges in
4 developing TASA projects because they are more likely to request
5 the use of in-kind contributions to reduce their cash local
6 match, more likely to lack financial resources and technical
7 expertise to oversee project development and construction, and
8 more likely to withdraw projects from the program, resulting in
9 funds being returned to the program and the project sponsor
10 reimbursing the department for federal expenditures without the
11 project being constructed. These factors result in smaller
12 communities being less likely to apply for TASA funds and
13 therefore limiting competition for and use of funds, especially
14 in the nonurban category. The following rule additions and
15 revisions address these factors.

16
17 Amendments to §11.404, Eligible Activities, add new subsection
18 (b) and re-designate the existing subsections accordingly. New
19 subsection (b) allows planning and design activities for the
20 construction of bicycle and pedestrian facilities to be eligible
21 for reimbursement but only for projects located in communities
22 with a population of 50,000 or less.

23
24 Amendments to §11.405, Allowable Costs, make various changes to
25 the section, add new subsections (b) and (e), and re-designate
26 the existing subsections accordingly. Subsection (a) is amended
27 to clarify which costs are allowable. New subsection (b)

1 transfers and revises existing §11.406(b) to provide that costs
2 incurred before the execution of the local agreement or before
3 federal and state authorization to proceed are not eligible for
4 reimbursement. Re-designated subsection (c) is changed to
5 provide that the costs of preliminary engineering, including
6 environmental studies and documentation, design, and plans,
7 specifications, and estimates (PS&E), are allowable only for
8 projects located in communities with a population of 50,000 or
9 less. This change reduces the financial burden of plan
10 development for smaller communities. New subsection (e) and the
11 change to re-designated subsection (d) clarify that pre-
12 construction costs are the responsibility of the project sponsor
13 unless the section provides otherwise.

14
15 Currently, the department's TASA program only funds
16 construction. Allowing project sponsors to use expenses that
17 were incurred in the plans, specifications, and estimate
18 development phase of a project as in-kind contributions was
19 intended to alleviate the burden of the local match for
20 construction. However, experience has shown that in-kind
21 contributions complicate project development and billing, delay
22 project delivery and obligation of funds, and require
23 substantial district and division staff time for oversight.

24
25 Amendments to §11.406, Local Funding Match, eliminate in-kind
26 contributions as an option for local match. The amendments add
27 a new subsection (b), which expands options for local match in

1 communities with a population of 50,000 or less to include
2 consideration of transportation development credits, state
3 funds, or both on an economic needs basis, subject to the
4 availability of funds. In subsection (c), the phrase "or
5 regulation" is deleted as an editing change because the
6 reference to federal law includes federal regulations. In
7 subsection (f), language is revised regarding the department's
8 direct state cost for consistency in the subchapter.

9
10 Preliminary cost estimates used to determine funding awards can
11 vary considerably from final engineer's estimates. Current
12 rules require project sponsors to be responsible for all of the
13 costs of overruns, which has led to withdrawal of projects or
14 reductions in project scope. Meanwhile, excess funds from
15 projects that are completed at a cost under the amount awarded
16 are returned to the department's TASA program balance, leading
17 to increased risk of funds lapsing due to federal guidelines'
18 limitation on the time during which TASA funds are available for
19 obligation.

20
21 Amendments to §11.411, Selection of Projects by the Commission,
22 authorize available program funds to be used for certain project
23 overruns. Subsection (d) is modified to replicate the existing
24 language in the Safe Routes to School (SRTS) Program rules (43
25 TAC §25.505(d)) to allow the responsible division administering
26 the program to consider applying program funds that remain after
27 the awards or that are returned to the program due to cost

underruns to projects with overruns, which will help minimize risk of lapsing TASA funds. Additional criteria language is added describing how the responsible division will apply these additional funds to projects with overruns on a needs basis.

The last sentence of subsection (d) is re-designated as subsection (e) and subsection (e) is re-designated accordingly.

FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined, in accordance with Government Code, §2001.024(a)(4), that as a result of enforcing or administering the rules for each of the first five years in which the proposed rules are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Eric Gleason, Director, Public Transportation Division, has determined that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed rules and therefore, a local employment impact statement is not required under Government Code, §2001.022.

PUBLIC BENEFIT

Eric Gleason has determined, as required by Government Code, §2001.024(a)(5), that for each year of the first five years in

1 which the proposed rules are in effect, the public benefit
2 anticipated as a result of enforcing or administering the rules
3 will be more efficient and streamlined implementation of bicycle
4 and pedestrian infrastructure in Texas communities with less
5 than 50,000 in population.

6
7 COSTS ON REGULATED PERSONS

8 Eric Gleason, has also determined, as required by Government Code,
9 §2001.024(a)(5), that for each year of that period there are no
10 anticipated economic costs for persons, including a state agency,
11 special district, or local government, required to comply with the
12 proposed rules and therefore, Government Code, §2001.0045, does
13 not apply to this rulemaking.

14
15 ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

16 There will be no adverse economic effect on small businesses,
17 micro-businesses, or rural communities, as defined by Government
18 Code, §2006.001, and therefore, an economic impact statement and
19 regulatory flexibility analysis are not required under Government
20 Code, §2006.002.

21
22 GOVERNMENT GROWTH IMPACT STATEMENT

23 Eric Gleason has considered the requirements of Government Code,
24 §2001.0221 and anticipates that the proposed rules will have no
25 effect on government growth. He expects that during the first
26 five years that the rule would be in effect:

- 27 (1) it would not create or eliminate a government program;

(2) its implementation would not require the creation of new employee positions or the elimination of existing employee positions;

(3) its implementation would not require an increase or decrease in future legislative appropriations to the agency;

(4) it would not require an increase or decrease in fees paid to the agency;

(5) it would not create a new regulation;

(6) it would not expand, limit, or repeal an existing regulation;

(7) it would not increase or decrease the number of individuals subject to its applicability; and

(8) it would not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

Eric Gleason has determined that a written takings impact assessment is not required under Government Code, §2007.043.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§11.403-11.406, and §11.411 may be submitted to Rule Comments, General Counsel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "*Transportation Alternatives Set-Aside Program Rule Revisions*." The deadline for receipt of comments is 5:00 p.m. on November 9, 2020. In accordance with

1 Transportation Code, §201.811(a)(5), a person who submits
2 comments must disclose, in writing with the comments, whether
3 the person does business with the department, may benefit
4 monetarily from the proposed amendments, or is an employee of
5 the department.

6
7 STATUTORY AUTHORITY

8 The amendments are proposed under Transportation Code, §201.101,
9 which provides the Texas Transportation Commission (commission)
10 with the authority to establish rules for the conduct of the
11 work of the department.

12
13 CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING

14 Title 23, United States Code, §133(h).

SUBCHAPTER G. TRANSPORTATION ALTERNATIVES SET-ASIDE PROGRAM

§11.403. Project Selection by MPOs.

(a) This section applies only to an MPO serving an urbanized area with a population over 200,000 and the award of TA Set-Aside funds suballocated for such an urbanized area.

(b) The MPO, in consultation with the department, shall develop a competitive process to allow project sponsors to submit project applications for funding that achieve the objectives of the TA Set-Aside Program.

(c) The MPO shall coordinate determinations regarding project eligibility, subject to audit by the FHWA.

(d) The MPO, in consultation with the department, shall conduct project selection in accordance with all applicable federal and state laws and regulations.

(e) The MPO, in consultation with the department, shall include the department's direct state costs for oversight of preliminary engineering and construction in TA Set-Aside project awards.

(f) ~~(e)~~ Following the conclusion of the competitive process, the MPO shall provide to the department a list of all projects submitted during the program call on which the selected projects are identified, and immediately shall begin the process required to include the selected projects in its TIP.

(g) ~~(f)~~ The project sponsor shall conduct project implementation in accordance with all applicable federal and state laws and regulations.

1 (h) [~~(g)~~] If a project is located on state right-of-way, the
2 project sponsor is responsible for securing a land-use permit
3 from the department prior to construction.

4 (i) [~~(h)~~] A project sponsor requesting an adjustment to the
5 minimum local funding match requirements based on the county's
6 status as an economically disadvantaged county is required to
7 obtain written authorization from the department, in the form
8 prescribed by the department, and must include the form with the
9 application submitted to the MPO. If an adjustment is granted,
10 the adjustment percentage in effect for the county at the time
11 the application is submitted to the MPO will be used. The
12 county must remain eligible for the adjustment until the date
13 the project sponsor enters into the local agreement.

14 (j) [~~(i)~~] Projects, or substantially similar projects,
15 submitted during a program call administered by the MPO are not
16 eligible for consideration under a concurrent program call
17 administered by the department.

18 (k) [~~(j)~~] Not later than November 15 of each year, the MPO
19 shall submit to the department a report that describes:

20 (1) the number of project applications received by the
21 MPO for the preceding federal fiscal year (the period of October
22 1 through September 30), including the aggregate cost of the
23 projects for which applications are received and the types of
24 projects to be carried out, expressed as percentages of the
25 MPO's total apportionment for TA Set-Asides; and

(2) the number of projects selected for funding by the MPO for the preceding federal fiscal year, including the aggregate cost and location of projects selected.

§11.404. Eligible Activities.

(a) During a program call administered by the department, TA Set-Aside funds may be awarded for any of the following activities:

(1) construction of on-road and off-road trail facilities for pedestrians, bicyclists, and other non-motorized forms of transportation, including sidewalks, bicycle infrastructure, pedestrian and bicycle signals, traffic calming techniques, lighting and other safety-related infrastructure, and transportation projects to achieve compliance with the Americans with Disabilities Act of 1990;

(2) construction of infrastructure-related projects and systems that will provide safe routes for non-drivers, including children, older adults, and individuals with disabilities to access daily needs;

(3) conversion and use of abandoned railroad corridors for trails for pedestrians, bicyclists, or other non-motorized transportation users; and

(4) construction of infrastructure-related projects to improve the ability of students to walk and bicycle to school, including sidewalk improvements, traffic calming and speed reduction improvements, pedestrian and bicycle crossing

1 improvements, on-street bicycle facilities, off-street bicycle
2 and pedestrian facilities, secure bicycle parking facilities,
3 and traffic diversion improvements in the vicinity of schools.

4 (b) Planning and design activities for the construction of
5 bicycle and pedestrian facilities are eligible only for projects
6 located in communities with a population of 50,000 or less.

7 (c) [(b)] A project that will require the acquisition of
8 real property through the exercise of eminent domain or
9 condemnation is not eligible for participation in the TA Set-
10 Aside Program.

11 (d) [(e)] Whether proposed as an independent project or as
12 an element of a larger transportation project, the project must
13 be limited to a logical unit of work and be constructible as an
14 independent project.

15
16 §11.405. Allowable Costs.

17 (a) Costs are allowable only if they are necessary
18 expenditures for a construction-related project and
19 ~~[expenditures that]~~ are eligible for reimbursement under
20 applicable statutes and regulations.

21 (b) Costs incurred before the execution of the local
22 agreement or before federal and state approval and authorization
23 to proceed are not eligible for reimbursement.

24 (c) [(b)] The costs of preliminary engineering, including
25 environmental studies and documentation ~~[planning]~~, design, and
26 plans, specifications, and estimates, are ~~[not]~~ allowable costs

only for projects located in communities with a population of 50,000 or less.

(d) ~~[(e)]~~ Eligible pre-construction costs incurred by the department are reimbursable. ~~[All other pre-construction costs are the responsibility of the project sponsor.]~~

(e) All pre-construction costs are the responsibility of the project sponsor except as provided by this section.

(f) ~~[(d)]~~ Expenditures for routine operation and maintenance are not allowable costs unless specifically allowed under the individual federal category for which the project qualifies.

\$11.406. Local Funding Match.

(a) Except as provided by this section, the ~~[The]~~ local funding match must be ~~[is a]~~ cash ~~[match or a combination of cash and in-kind contribution]~~ provided by or through the project sponsor. ~~[An in-kind contribution may include only actual and documented costs incurred by the project sponsor for the development of project plans, specifications, and estimates that would otherwise be eligible for reimbursement under applicable statutes and regulations.]~~

(b) For a community with a population of 50,000 or less, transportation development credits, state funds, or both may be available to apply to all or part of the local funding match if the community:

(1) is in an economically disadvantaged county, as defined in the Transportation Code, §222.053(a) or described by Transportation Code, §222.053(a-1); or

(2) satisfies economic need criteria specified in the program call materials.

~~[(b) Costs incurred prior to execution of the local agreement or prior to federal and state approval and authorization to proceed are not eligible for consideration as in-kind contributions.]~~

(c) Funds from other federal programs may be used as a local funding match only when specifically authorized by federal law ~~[or regulation]~~.

(d) Donated services may not be accepted as a local funding match~~[r]~~ but may be used to reduce the overall cost of the project.

(e) If a project selected by the commission is implemented by the department, the project sponsor must provide the local funding match prior to the commencement of project activities for each phase of work.

(f) Projects selected by the commission will include the department's direct state costs for oversight of preliminary engineering and construction in TA Set-Aside project awards~~[an administrative cost for the department's oversight]~~. ~~[The local funding match associated with this administrative cost must be provided in cash.]~~

§11.411. Selection of Projects by the Commission.

(a) The commission, by written order, will select projects for funding under the TA Set-Aside Program based on:

(1) recommendations from the director of the division responsible for administering the TA Set-Aside Program;

(2) the potential benefit to the state of the project; and

(3) whether the project enhances the surface transportation system.

(b) The commission is not bound by project selection recommendations provided by the department.

(c) The department will notify the project sponsor of the selection.

(d) The commission will award an amount [~~specify a fixed amount~~] of TA Set-Aside funds for each project. If program funds remain or are returned to the program due to cost underruns, the responsible division administering the program may apply those funds to project overruns based on:

(1) justification of overruns;

(2) timing of request;

(3) availability of funds;

(4) a reasonable expectation of the ability of the project sponsor to complete the project; and

(5) if overrun requests exceed available funds, the criteria applicable to the use of state funds under §11.406(b) of this subchapter.

1 ~~[Project costs in excess of this amount are the responsibility~~
2 ~~of the project sponsor.]~~

3 (e) The project sponsor may seek additional funds through
4 the TA Set-Aside Program in subsequent program calls.

5 (f)~~[(e)]~~ A project that is not selected must be resubmitted
6 to receive consideration during subsequent program calls.